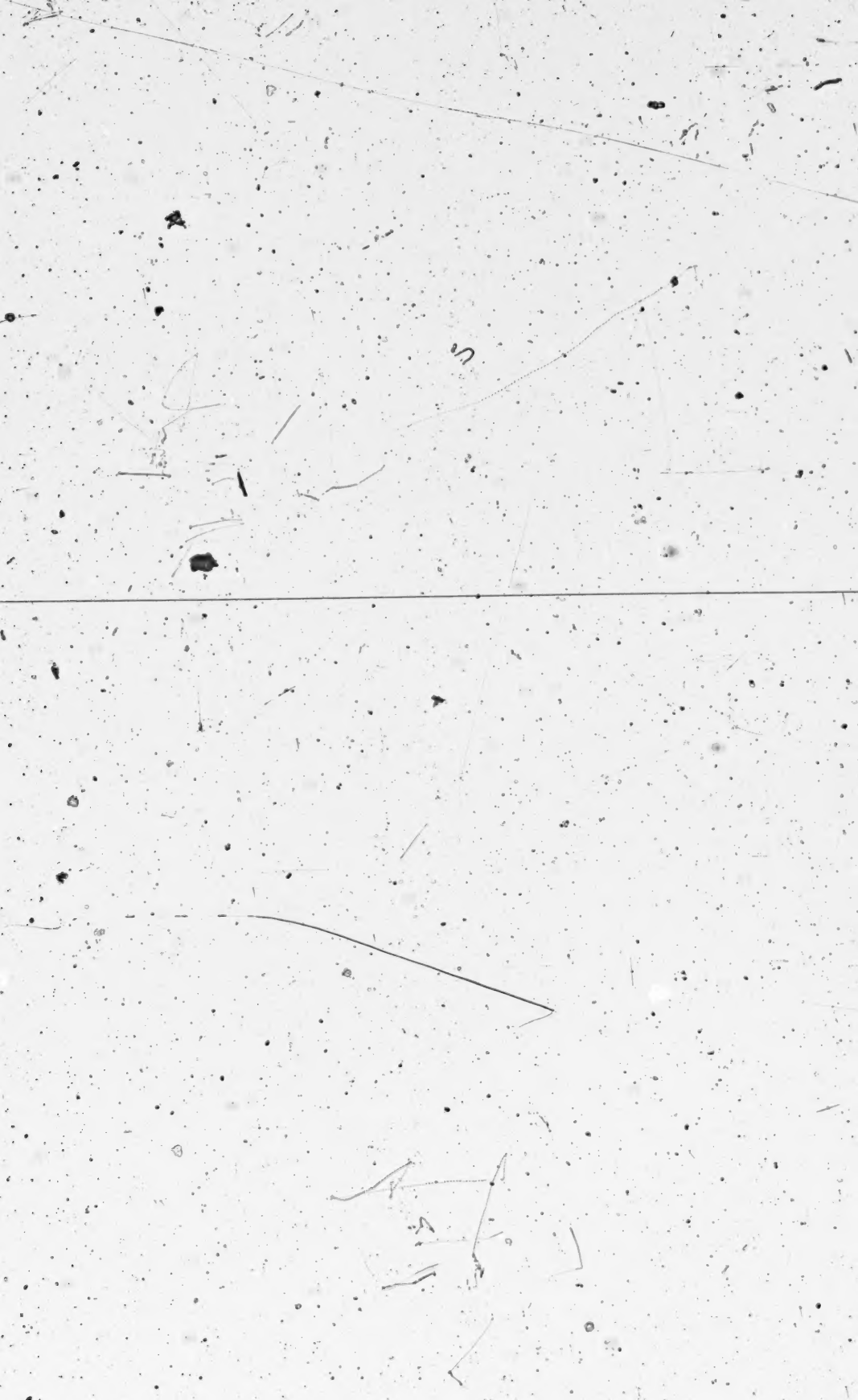

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1947

Petition not printed

No. 542

FRANK TOWNSEND,

Petitioner,

vs.

C. J. BURKE, WARDEN, EASTERN STATE PENITENTIARY,

Respondent

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE COMMONWEALTH OF PENNSYLVANIA

BRIEF FOR THE PETITIONER

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Counsel for Petitioner.

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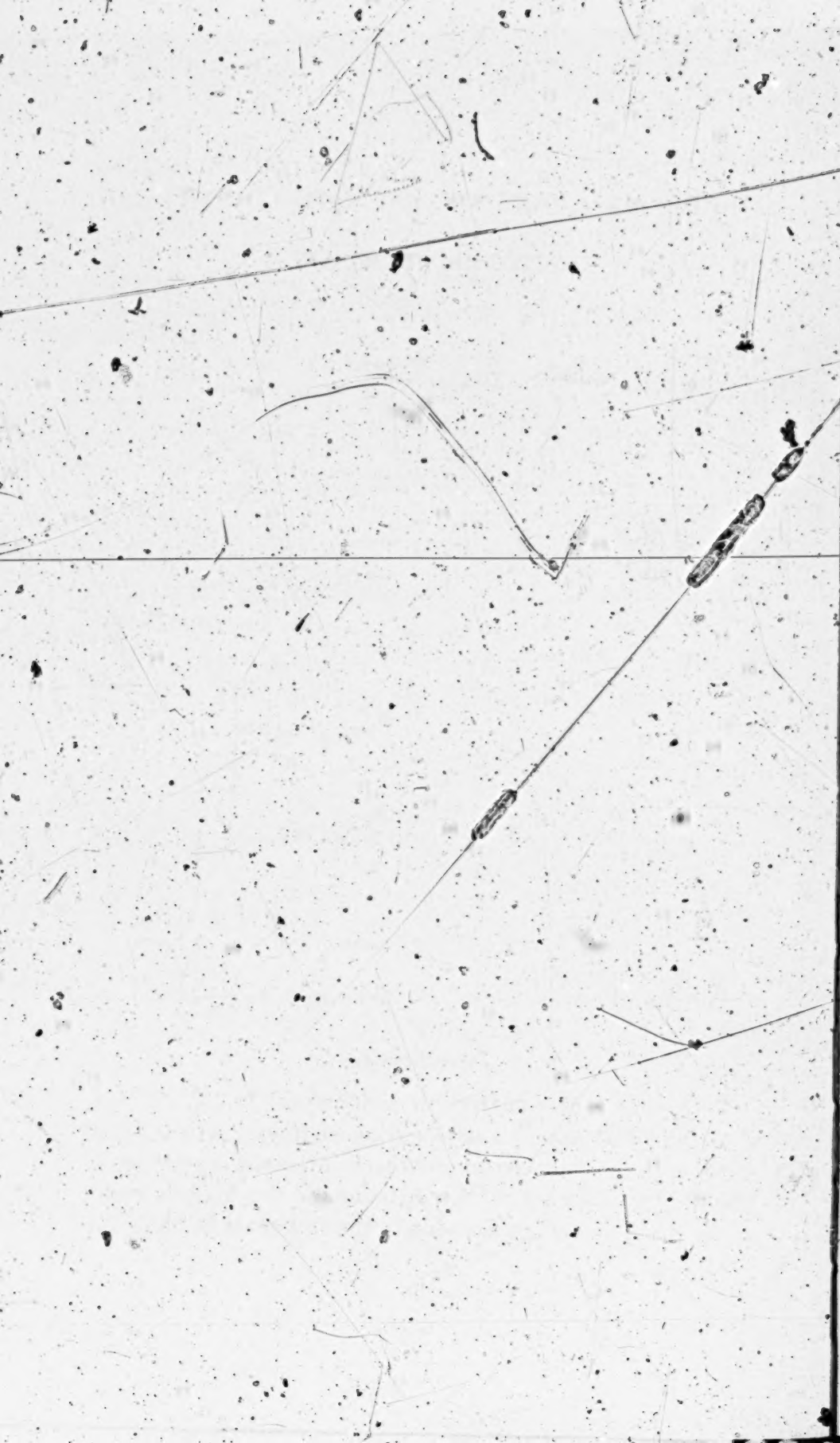

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Opinion Below

The Supreme Court of Pennsylvania did not file an opinion.

Jurisdiction

Petitioner contends that his confinement in the Eastern State Penitentiary is a deprivation of liberty without due process of law in violation of the Fourteenth Amendment. The Supreme Court of Pennsylvania is the highest court of the State in which a decision in the suit could be had. Its

final order on the petition for a writ of *habeas corpus* was entered on May 26, 1947 (R. 1). Petitioner's motion for leave to proceed *in forma pauperis* and his petition for certiorari were filed on August 1, 1947 and granted on January 19, 1948 (R. 54). The jurisdiction of this Court is based upon Section 237(b) of the Judicial Code as amended by the Act of February 13, 1925.

Question Presented

Whether the action of the Pennsylvania authorities in holding petitioner incommunicado for the forty hours between his arrest and trial, except for a ten minute conversation with his wife, and in sentencing him immediately thereafter to a long term of imprisonment, without benefit of counsel or explanation of the charges against him, met the fundamental standards of fairness and decency imposed by the Fourteenth Amendment.

Statement

Petitioner was arrested at 7:15 P. M. on June 3, 1945, by the Philadelphia police and taken to the 9th District Police Station where he was questioned for an hour (R. 2-3). Then he was moved to another police station and questioned again (R. 3). Thereafter he was transferred to still a third station (R. 3). At 5:00 P. M. on June 4 he was taken to the City Hall to be fingerprinted, and was returned to the police station (R. 3). During all this period he was "deprived of his right to contact anyone" (R. 3). Finally, about two o'clock in the morning he was allowed to speak to his wife but even this opportunity to secure comfort and advice was limited by the police to ten minutes (R. 3). At nine o'clock the next morning petitioner was brought before the Court of Quarter Sessions and called upon to answer seven indictments containing numerous counts, charging him and five

other defendants with various degrees of aggravated assault, robbery, burglary and related offenses (R. 30-44).

When petitioner was called to plead, he was not advised of his right to engage counsel. He was given no instruction concerning the nature of the crimes with which he was charged (R. 3). Presumably the indictment was read, although the record does not show; and petitioner pleaded "Guilty" to some charges and "Not Guilty" to others (R. 30, 34, 37, 40, 43, 44). A police officer and one other witness gave a cursory account of the crimes (R. 46-51). The court then examined the criminal record of each defendant and passed sentence. Its lack of concern for petitioner's rights is revealed by the Judge's comments in passing sentence on petitioner (R. 51-52), which were the only remarks directed to him by the court:

"By the Court (addressing Townsend):

Q. Townsend, how old are you?

A. 29.

Q. You have been here before, haven't you?

A. Yes, sir.

Q. 1933, larceny of automobile. 1934, larceny of produce. 1930, larceny of bicycle. 1931, entering to steal and larceny. 1938, entering to steal and larceny in Doylestown. Were you tried up there? No, no. Arrested in Doylestown. That was up on Germantown Avenue, wasn't it? You robbed a paint store.

A. No. That was my brother.

Q. You were tried for it, weren't you?

A. Yes, but I was not guilty.

Q. And 1945, this. 1936, entering to steal and larceny, 1350 Ridge Avenue. Is that your brother too?

A. No.

Q. 1937, receiving stolen goods, a saxophone. What did you want with a saxophone? Didn't hope to play in the prison band then, did you?

The Court: Ten to twenty in the Penitentiary."

On May 15, 1947, petitioner filed an application for a writ of *habeas corpus* (R. 2-6) in the Supreme Court of Pennsylvania in which he described the foregoing events and alleged, although somewhat inexpertly, that he "was at a disadvantage without the assistance of counsel" (R. 6). Neither the warden's answer which set forth the judgment of conviction and order of commitment (R. 7-9) nor the district attorney's answer (R. 10-11) denied petitioner's allegations.

Although *habeas corpus* may not be used as a substitute for an appeal, it is the proper remedy under Pennsylvania law for attacking a sentence passed in violation of a fundamental or constitutional right. *Commonwealth ex rel. Schultz* v. *Smith*, 139 Pa. Super. 357, cited with approval in *Commonwealth ex rel. Penland* v. *Ashe*, 341 Pa. 337, 341-342; cf. *Commonwealth ex rel. McGlinn* v. *Smith*, 344 Pa. 41. There is no suggestion that the petition was procedurally deficient in the instant case. The conclusion is inescapable, therefore, that the Supreme Court of Pennsylvania ruled on the Federal question raised by the application for *habeas corpus*. Thus the petition for certiorari brings petitioner's claim properly before the Court.

Specification of Errors to Be Urged

The Supreme Court of Pennsylvania erred:

1. In failing to hold that under the circumstances set forth in the petition for *habeas corpus*, petitioner was constitutionally entitled to the assignment of counsel.[1]

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[1] The petition for *habeas corpus* makes the unqualified contention that the Fourteenth Amendment requires the assignment of counsel in all serious cases. We believe, for the reasons hereafter stated that petitioner's case does not depend upon this bald claim, and therefore do not elaborate any argument that *Betts* v. *Brady*, 316 U. S. 455, and *Foster* v. *Illinois*, 332 U. S. 134, should be overruled. In view of the close division of the Court in those cases, however, it seems proper to state expressly that the petitioner's contention that the Fourteenth Amendment requires that assignment of counsel in all criminal cases is not intended to be waived.

2. In failing to hold that under the circumstances set forth in the petition for *habeas corpus*, petitioner was sentenced, in violation of the Fourteenth Amendment, without due process of law.

3. In denying the petition for *habeas corpus*.

Summary of Argument

Petitioner was arraigned and sentenced without due process of law. Due process of law requires a fair opportunity to answer an accusation understandingly. Hence, when the charges are too serious and the potential issues too complex for a layman to comprehend, the State must offer counsel to a defendant, not otherwise protected, at all stages of the proceeding against him. *Williams* v. *Kaiser*, 323 U. S. 471; *Rice* v. *Olson*, 324 U. S. 786. Petitioner had need of such assistance. The charges were too numerous and complex for petitioner as a layman to understand the different accusations, discriminate between them, appraise the possible defenses, and then reach an intelligent judgment concerning his guilt or innocence with respect to each charge.

The fundamental unfairness of the proceeding was aggravated by the misconduct of the prosecuting officials. After petitioner's arrest, during the critical time when an ingredient of unfairness may enter which will taint the entire course of a proceeding, the Philadelphia police held petitioner unlawfully without bringing him before a magistrate, and for approximately 30 hours would not permit him "to contact anyone" (R. 3). The next morning he was arraigned and sentenced. Thus, petitioner had no opportunity to study the charges or to obtain comfort or advice. The bewilderment and despair engendered by this mistreatment would have destroyed whatever opportunity he might otherwise have had to prepare an understanding answer to the accusations against him.

The trial court did nothing to assure petitioner the substance of a hearing. The court gave him no instructions concerning the charges nor his constitutional rights. In short, on accusations impossible for a layman to meet unaided, petitioner was rushed from arrest to confinement without interruption and without opportunity for guidance or advice.

The conviction and sentence are therefore void.

ARGUMENT

I

Petitioner Was Arraigned and Sentenced Without Due Process of Law

The "due process of law" which the Fourteenth Amendment secures to every person charged with crime requires this Court, when its jurisdiction is properly invoked, to review the whole course of the State proceedings to see if they violated any "principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental" (*Palko* v. *Connecticut*, 302 U. S. 319, 327). And although a majority of the Court has been unwilling to subsume under the Fourteenth Amendment all the specific guarantees of the Bill of Rights (*Adamson* v. *California*, 332 U. S. 46, *Foster* v. *Illinois*, 332 U. S. 134), the course of decision here defines with no little particularity the canons of decency and fairness by which the conduct of State proceedings may be judged. Chief among them is the right to "the substance of a hearing" (*Palko* v. *Connecticut, supra*). A State is required to give the defendant an opportunity to meet the accusation against him. A formal hearing is not sufficient; the opportunity to answer must be real. Moreover, in reviewing a conviction alleged to result from denial of this fundamental right,

this Court will not confine itself to the judicial proceeding but will scrutinize the prior conduct of the State authorities in dealing with the petitioner to ascertain whether it vitiated a proceeding which was formally correct. *Frank* v. *Mangum*, 237 U. S. 309, 327; *Smith* v. *O'Grady*, 312 U. S. 329; *Mooney* v. *Holohan*, 294 U. S. 103; *Carter* v. *Illinois*, 329 U. S. 173, 175; cf. *von Moltke* v. *Gillies*, No. 73, this Term; *Brown* v. *Mississippi*, 297 U. S. 278; *Maliniski* v. *New York*, 324 U. S. 401.

The principle that every person charged with crime has a constitutional right to the substance of a hearing has found numerous applications in the decisions of the Court. In *Frank* v. *Mangum*, 237 U. S. 309, it was recognized that if a trial is dominated by the fear of mob violence so that there is an actual interference with the course of justice, there is a departure from due process of law. *Moore* v. *Dempsey*, 261 U. S. 86, reaffirmed that holding in a case in which legal forms were observed but where, according to the prisoner's allegations, the whole proceeding was a mask because counsel, jury and judge were swept to the fatal end by an irresistible wave of public passion; the Court held that upon proof of the allegations, the conviction would be set aside. Both decisions rest upon the ground that petitioner was denied a genuine opportunity to meet the charge against him.

Mooney v. *Holohan*, 294 U. S. 103, shows the principle in another aspect. The petitioner was convicted by the deliberate use of perjured testimony. The Court held that the demands of due process could not be satisfied by mere notice and hearing "if a State has contrived a conviction through a pretense of a trial which in truth is but used as a means of depriving a defendant of liberty through a deliberate deception of court and jury by the presentation of testimony known to be perjured" (294 U. S. at 112).

Compare *Smith* v. *O'Grady*, 312 U. S. 329. Again the hearing was not real.

These illustrations help to place in their proper perspective the claims of denial of a constitutional right to counsel which are being pressed with increasing frequency by applications for *habeas corpus*. A hearing is a sham when the accused cannot meet the charge because he cannot comprehend it or cannot intelligently manage his defense. Consequently the canons of decency and fairness which are essential to due process impose upon a State the duty to take whatever measures are necessary under the circumstances of the particular case to ensure that the defendant understands the charge and has a fair opportunity intelligently to prepare and present his answer. It will not be suggested that a State is not required to give aid to a defendant in bringing his witnesses before the court, or to supply an interpreter to a defendant who does not know the language in which the proceedings are conducted. Such assistance is essential to the substance of a hearing. In other cases an explanation of the meaning of the accusations, of the ingredients of the offenses and of the defenses potentially available may be equally indispensable. This principle has never been questioned despite differences in opinion as to whether, in view of the complexities of criminal proceedings, the State should not be required to offer to assign counsel in all serious criminal cases. Thus, the Court has held that when a serious crime is charged and the defendant is incapable of conducting his own defense, due process is not satisfied by anything less than the assignment of counsel. *Powell* v. *Alabama*, 287 U. S. 45; *Rice* v. *Olson*, 324 U. S. 786; *De Meerleer* v. *Michigan*, 329 U. S. 663. The need may exist whether the accused stands trial or pleads guilty. *Williams* v. *Kaiser*, 323 U. S. 471; *Rice* v. *Olson*, *supra*; *Foster* v. *Illinois*, 332 U. S. 134,

137. The personal qualifications of the accused, the seriousness of the charge, and the complexity of the potential issues are relevant circumstances. Likewise, the conduct of the prosecuting officials may be decisive. Cf. *Smith* v. *O'Grady*, 312 U. S. 329. Summarizing its early decisions the Court said in *White* v. *Ragen*, 324 U. S. 760, 763—

> We have many times repeated that not only does due process require that a defendant on trial upon a serious criminal charge and unable to defend himself shall have the benefit of counsel . . .

Other decisions suggest that in appropriate cases the States may refrain from offering the assignment of counsel and delegate to the trial judge the responsibility of safeguarding the interests of the accused by giving him the legal advice and assistance necessary to a fair hearing. See *e.g.*, *Betts* v. *Brady*, 316 U. S. 455, 470-472; cf. *Foster* v. *Illinois*, 332 U. S. 134. But although the Fourteenth Amendment does not establish a rigid procedure binding the States to proffer counsel in all cases, its guarantee of due process of law, requires a State, by one appropriate means or another, to give every person charged with crime whatever guidance is necessary to a fair opportunity to answer the accusations. Nothing less meets the bare requirement of "the substance of a hearing."

When petitioner was arraigned, these essential safeguards were omitted. He was called upon to plead to seven voluminous indictments charging serious offenses. The number of charges, the nice distinctions and the legal verbiage would bewilder any layman; it also appears that there were several defenses the potential availability of which only a lawyer would appreciate. When defendant was required to answer these charges, alone and unaided, he had been unlawfully shut off from advice and assistance and subjected to the psychological pressures of being held

incommunicado for all but ten minutes of the forty hours intervening between his arrest and arraignment (R. 3). In court, "he was not advised of his right to engage counsel, nor was he instructed of the particular offenses" which the indictments charged (R. 3). The court's attitude was not one of solicitude to assure the fairness of the hearing. On the contrary its chief concern appears to have been (R. 52):

> "• • • What did you want with a saxophone? Didn't hope to play in the prison band then, did you?
> "Ten to twenty in the Penitentiary."

Thus petitioner's case does not depend upon the bald claim that because the record does not disclose an offer of counsel upon his plea of guilty, he was denied due process of law. The fundamental unfairness which vitiates the sentence under which he is held resulted from the concurrence of three factors: (A) the complexity of the accusations; (B) the misconduct of the police; and (C) the indifference of the trial court towards petitioner's rights. Elaboration of petitioner's need for counsel or some equivalent assistance under these circumstances would seem to be unnecessary but, out of caution, it may be appropriate to call attention to the difficulties that confronted him in more detail.

A. *The charges against petitioner were of such complexity as to make informed guidance essential to an understanding answer.*

When petitioner was brought before the Court of Quarter Sessions, he was called upon to plead to seven indictments charging him with twenty different offenses. Indictment No. 691 charged improper possession of a firearm (R. 30-31). Indictment No. 696 contained six different counts all based upon the alleged robbery of Wade Mitchell: (1) assault with an offensive weapon, with intent to rob (R.

31); (2) assault with other persons, with intent to rob (R. 31); (3) robbery being armed with an offensive weapon (R. 32); (4) robbery together with other persons (R. 32-33); (5) robbery, and at the commission thereof beating, striking and ill-using (R. 33); and (6) committing a crime of violence while armed with a firearm (R. 33). Indictment No. 701 referred to the same events but charged the additional crime of burglary (R. 43-44). Indictments Nos. 698 and 699 were based upon the attempted robbery of the Yellow Cab Company, and again the pleader alleged seven different offenses in legal phrases requiring legal training to discriminate between the counts (R. 38-42). Indictments Nos. 697 and 700 (R. 35, 42), on which petitioner was later found not guilty, relate to another robbery.

Argument is scarcely necessary to demonstrate that merely upon hearing them read aloud a layman could not plead intelligently to these seven indictments, embracing twenty distinct offenses. At the very most he might realize, as petitioner apparently knew, that he was charged with improper possession of a firearm and complicity in three "hold-ups." He might distinguish, as petitioner apparently distinguished, between the "hold-ups" with which he had some connection and those with which he had none. But beyond this point petitioner was helpless. He could not know that Indictments Nos. 696 and 698 each charged him with six distinct crimes, that each crime contained its own peculiar ingredients, and that different defenses might be available to each. Ignorant of these legal niceties petitioner could not truly comprehend the different offenses, discriminate between them, and then reach an intelligent judgment concerning his guilt or innocence with respect to each charge. Hence even if we assume that because petitioner distinguished between different indictments in entering his pleas, he must have known that he had committed a crime, we cannot tell the degree of prejudice caused by the absence

of counsel. Cf. *Glasser* v. *United States*, 315 U. S. 60, 75-76. Only counsel, after a thorough study of the relevant facts could determine the counts to which a plea of not guilty was appropriate and those on which petitioner might be guilty of a lesser included offense. But while proof of prejudice is not essential (*Williams* v. *Kaiser*, 323 U. S. 471, 475-476, 479 n. 7), it is plain from this record that there were important issues which petitioner could not appreciate but which experienced counsel have explored before advising him how to plead.

1. Indictments Nos. 696 and 698 charged (a) assault being armed with an offensive weapon (R. 31, 38), (b) robbery being armed with an offensive weapon (R. 32, 38-39), and (c) committing a crime of violence while armed with a firearm (R. 33, 40). Both indictments alleged that there were a number of participants in the robberies and, although the question is arguable, it is probable that the prosecution's case would be made out under charges (a) and (b) by showing that any one of them was armed. *People* v. *Byrnes*, 302 Ill. 407; *People* v. *Paradiso*, 248 N. Y. 123. Such proof would not sustain a conviction, however, under (c), the count for committing a crime of violence while armed with a firearm. *People* v. *Paradiso*, *supra*. We cannot tell on which theory the commonwealth proceeded against petitioner nor whether petitioner was armed, but it requires no stretch of the imagination to suppose that the commonwealth was proceeding on the erroneous theory advanced by the State in *People* v. *Paradiso*, *supra*, and petitioner was not armed. Petitioner cannot be supposed to have realized the importance of the question. We submit that it was fundamentally unfair not to grant him an opportunity to be advised concerning a defense into which he could not, but an attorney would surely, have inquired.

2. Both Indictment No. 696 and Indictment No. 698 charged assault being armed with an "offensive weapon" and robbery being armed with an "offensive weapon" (R. 31, 32, 38, 39). An attorney assigned to defend the accused would have inquired about the weapon used in the robbery and a defense, not apparent to the accused, might have been predicated upon the point. Even if it is assumed that the accused was armed with a firearm, the issue is not clear. The Pennsylvania courts apparently have not decided whether an *unloaded* firearm is an "offensive weapon." Other jurisdictions have consistently held, however, that an unloaded gun is not a "dangerous" or "deadly" weapon (*Price* v. *United States*, 156 Fed. 950, 952; *People* v. *Sylva*, 143 Cal. 62; *People* v. *Tremaine*, 129 Misc. 650; Anno. 74 A. L. R. 1206), and such decisions might well have been regarded as controlling on the question whether petitioner and his co-defendants carried an "offensive" weapon. Similarly, it has been held, although the weight of authority may be to the contrary, that robbery with an unloaded gun is not robbery "being armed with a dangerous weapon." *Luitze* v. *State*, 204 Wisc. 78. It does not tax one's credulity to assume that the gun used in these robberies was unloaded, and that Pennsylvania might have followed the Wisconsin rule. The most serious charges against petitioner, therefore, may well have been unfounded; yet petitioner, because he could not know the importance of the point, was denied the opportunity to raise it.

3. Indictments Nos. 700 and 701 charged petitioner with burglary (R. 42-44). Both indictments appear to have been laid under P. L. 872, § 901, of the Laws of 1939 which provides—

> Whoever, at any time, wilfully and maliciously, enters any building, with intent to commit any felony therein is guilty of burglary * * *.

Section 901 is a codification of P. L. 382, § 135, of the laws of 1860, P. L. 531, § 2, of the Laws of 1863 and P. L. 49, § 1, of the Laws of 1901. Under the earlier statutes proof of entry was not sufficient; an actual or constructive breaking was part of the offense. *Roland* v. *Commonwealth*, 82 Pa. 306, 323, 325-327; *Johnston* v. *Commonwealth*, 85 Pa. 54, 57; *Commonwealth* v. *Shawell*, 29 Berks 124, 126. As a partial codification of the Pennsylvania criminal statutes, P. L. 872 is "a revision and consolidation for clearness, certainty and convenience of all the prior statutes on the subject, a partial codification to the purpose of which amendment or change was only incidental" (*Bell* v. *Abraham*, 343 Pa. 169, 173). Hence the Pennsylvania courts, when confronted with so novel a definition of the familiar offense of burglary, might well look beyond the bare words, examine the legislative development of the statute and conclude that despite the change in phraseology that the reenactment did not dispense with any of the former ingredients of the offense.[2] Under such circumstances an experienced criminal lawyer assigned to defend the petitioner would certainly have inquired into the circumstances under which petitioner entered the two buildings in question. He might well have established a successful defense to either or both indictments, or have induced the court to accept a plea to a lesser included offense, by showing that there was neither an actual nor a constructive breaking.

4. A careful study of the evidence in the record concerning the robbery of Wade Mitchell (Indictments Nos. 696 and 701) suggests that an experienced attorney would have advised petitioner to plead not guilty to several, if not all, of the seven charges. Mitchell and Detective Lane were

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[2] Counsel are informed that this codification was not prepared by a legislative commission but by an individual member of the Bar Association.

called as witnesses to describe the crimes for the judge's guidance in passing sentence. Mitchell testified that two men robbed him (R. 49) but was able to identify only the defendant Cain (R. 49). Detective Lane told the court that petitioner participated in the crime (R. 47) but neither disclosed the basis for his assertion nor described the extent of petitioner's complicity. The two statements attributed by Detective Lane to petitioner's co-defendants identified only Joe Kopitsko, Charley Cain and Eddy Keenan (R. 48). Like Mitchell's testimony these statements made it plain that only two men, Cain and Keenan, entered the garage. Thus the record strongly suggests that there was very little, if any, evidence of Townsend's participation in the robbery. And even if we are to infer from his plea of guilty that he had some connection with the men who did rob Mitchell, it is not fair to infer from the uninstructed answer of a layman that the connection was close enough to make him principal in the offenses charged. Only an experienced attorney with all the evidence before him could tell whether what might have seemed to petitioner to be complicity was too tenuous a connection to make him guilty of the crime.

5. Finally, there is a great probability that an attorney could have rendered real assistance to petitioner when sentence was imposed. At that stage in a proceeding it is customary to hear whatever can be said in mitigation, whether based upon the minor role of the accused in the offenses charged or upon his prior conduct, background, character and peculiar circumstances. An attorney could marshal the relevant facts and bring them to the court's attention. See Brief for Petitioner in *Gryger* v. *Burke, Warden*, No. 541, this Term. Petitioner had no such skill and appears to have been given no such opportunity. Moreover, when the normal rules of evidence are not followed in imposing sentence, trained assistance becomes the more

important. For example, Detective Lane included in his recital a description of various crimes which he said petitioner had committed on March 18, 1945 (R. 47). These charges were not embraced in any of the indictments before the court. Later, when Detective Lane started to describe an offense said to have been committed on April 29 by some of petitioner's co-defendants (R. 48), the court observed that the matter was not properly before it because it was not covered by any of the indictments. The court apparently failed to observe, however, that the same mistake had already been made with respect to petitioner. In view of the latitude permissible in receiving evidence on the sentence to be imposed, we do not suggest that the description of other offenses was improperly brought before the court, nor can we tell whether prejudice resulted from taking Detective Lane's one-sided account into consideration. It is clear, however, that petitioner was treated differently from his co-defendants, and that if counsel had been present, he would have protected Townsend against the dangers inherent in giving weight to such accusations while the proper punishment was being weighed. As petitioner points out (R. 6), the disadvantage which he suffered "is evidenced by the fact that one of the defendants with whom petitioner was tried had an attorney and, in turn received a much lighter sentence than the one your petitioner received." (Compare R. 52 and R. 53-54.)

In this proceeding there is no occasion to pass judgment upon the merits of the potential defenses outlined above. Upon investigation they might have been found to lack merit, or the facts might have suggested others. Their importance in this case is that they illustrate in some detail the inadequacies of the hearing which petitioner received. Thus, what was said in *Powell* v. *Alabama*, is applicable here:

> Even the intelligent and educated layman has small and sometimes no skill in the science of law. If charged

> with crime, he is incapable, generally, of determining for himself whether the indictment is good or bad. He is unfamiliar with the rules of evidence. Left without the aid of counsel he may be put on trial without a proper charge, and convicted upon incompetent evidence, or evidence irrelevant to the issue or otherwise inadmissible. He lacks both the skill and knowledge adequately to prepare his defense, even though he have a perfect one. He requires the guiding hand of counsel at every step in the proceedings against him. Without it, though he be not guilty, he faces the danger of conviction because he does not know how to establish his innocence. If that be true of men of intelligence, how much more true is it of the ignorant and illiterate, or those of feeble intellect.

Those observations "are as pertinent in connection with the accused's plea as they are in the conduct of a Trial" (*Williams* v. *Kaiser*, 323 U. S. 471, 475).

In sum, we rest our contentions on this branch of the case on two propositions. First, due process of law requires a State to offer counsel to an indigent defendant not otherwise protected whenever the charges are too serious and the potential issues too complex to permit a fair opportunity to answer without legal advice. Second, in the instant case, although petitioner required such assistance a' quately to answer the accusations with which he was confronted, the police held him incommunicado, no offer of counsel was tendered and no care for his protection was taken by the court.

Williams v. *Kaiser*, 323 U. S. 471, is controlling on both branches of the argument. In that case the Court held that the "rule of *Powell* v. *Alabama*" would be applicable if Williams established his allegation that he was required to plead to a charge of robbery by means of a deadly weapon without the assistance of counsel although he "was incapable adequately of making his own defense" (No. 102, October Term 1944, Record, p. 2). In the instant case the

chief charges against petitioner were the same as those leveled against Williams; indeed petitioner's difficulties were the greater, if anything, because of the multiplicity of counts and the nice distinctions between them. Petitioner's need for counsel was no less than Williams's. Neither petitioner nor Williams appears to have had either greater or less ability to defend himself than the average person charged with crime. Each needed the aid of counsel lest he become the victim of overzealous prosecutors, of the law's complexity, or of his own ignorance or bewilderment.

The minor factual differences between the two cases are plainly irrelevant. No valid argument can be predicated on the fact that in Williams's case a death sentence was possible while in petitioner's case the maximum sentence would result in imprisonment for the rest of his life. *Rice* v. *Olson*, 324 U. S. 786; See *Canizio* v. *New York*, 327 U. S. 82, 85. Nor can a distinction be predicated upon the difference in the allegations with respect to the ability of the accused to represent himself. Each prisoner suffered from the layman's inability to meet a complicated indictment without some guidance by one experienced in the law. Williams asserted that he "was incapable adequately of making his own defense." Petitioner alleged that he was not "instructed of the particular offenses covering Bills # 696, 698, 699 and 701, May Sessions, 1945" (R. 3) and referred, albeit obliquely, to the fact that "your petitioner was at a disadvantage without the assistance of counsel" (R. 6). Thus Williams stated the conclusion to be drawn from the circumstances of his case whereas petitioner's averments call attention to the omission of instructions concerning the accusations and then suggest proof of the resulting prejudice. The difference is immaterial. For although a conviction of crime is not to be impeached lightly, petitions for *habeas corpus* asserting a denial of the fundamental prin-

ciples of justice are not to be read with all the nicety of common law pleadings. "• • • we can hardly demand of a layman and pauper who draws his petition behind prison walls the skill of one trained in the law. • • • A deprivation of the constitutional right of counsel should not be readily inferred from vague allegations. But where the substance of the claim is clear, we should not insist upon more refined allegations than paupers, ignorant of their right of counsel and incapable of making their defense, could be expected to supply." (*Tomkins* v. *Missouri*, 323 U. S. 485, 487). Petitioner's allegations, thus read, are plainly sufficient to entitle him to a hearing at which his need for counsel may be examined in more detail.

It is equally irrelevant that the prisoner in *Williams* v. *Kaiser* alleged that his request for the assistance of counsel had been denied. In the companion case of *Tomkins* v. *Missouri*, 323 U. S. 485, in which no such request had been made, the Court held that "one who was not represented by counsel, who did not waive his right to counsel and who was ignorant of his right to demand counsel is one of the class which the rule of *Powell* v. *Alabama* was designed to protect" (p. 488). See also *Rice* v. *Olson*, 324 U. S. 786, 788-789; compare *Johnson* v. *Zerbst*, 304 U. S. 458. Petitioner's allegations that he did not know of (R. 6), and was given no instruction concerning, his right to counsel (R. 3, 6) bring him within the same group. In short, the present case falls squarely within the "rule of *Powell* v. *Alabama*" as applied in *Williams* v. *Kaiser* and similar cases.[3]

[3] In *Rice* v. *Olson*, 324 U. S. 786, an Indian had pleaded guilty to an indictment for burglary and was sentenced, on a plea of guilty, to from one to seven years. The defendant had not been represented by counsel. The Court held the sentence void, saying pp. 788-789—"A defendant who pleads guilty is entitled to the benefit of counsel, and a request for counsel is not necessary. It is enough that a defendant charged with an offense of this character is incapable adequately of making his defense, that he is

Petitioner's case, however, does not rest exclusively upon the ground that a State has a duty to offer counsel to an indigent defendant, or to afford him guidance in another appropriate manner, whenever the indictment potentially raises questions of law which a layman would not understand. Immediately after the arrest, during the critical time when an ingredient of unfairness may enter which will taint the entire course of a crimial proceeding, the Philadelphia police held petitioner unlawfully without bringing him before a magistrate, and for approximately 30 hours refused to permit him "to contact anyone" (R. 3). When petitioner finally was brought before the court, he was not warned of his rights nor instructed concerning the crimes with which he was charged (R. 3). These circumstances are to be weighed together with petitioner's lack of counsel in ascertaining the fairness of the proceeding. They distinguish such cases as *Bute* v. *Illinois*, No. 398, this Term, as well as *Betts* v. *Brady*, 316 U. S. 455 and *Foster* v. *Illinois*, 332 U. S. 134. We turn, therefore, to examine the conduct of the police authorities and the trial judge in more detail.

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unable to get counsel, and that he does not intelligently and understandingly waive counsel."

In *White* v. *Ragen*, 324 U. S. 760, 763-764, the Court observed—"We have many times repeated that not only does due process require that a defendant, on trial in a State court upon a serious criminal charge and unable to defend himself, shall have the benefit of counsel. • • •"

In *Canizio* v. *New York*, 327 U. S. 82, the prisoner's papers alleged that when he was nineteen and unfamiliar with legal proceedings, he was sentenced for armed robbery without counsel being offered or requested. The Court said (p. 85)—"• • • had there been nothing to contradict petitioner's general allegation that he was not represented by counsel in the interim between his plea of guilty and the time he was sentenced, his charges would have been such as to have required the court to hold a hearing on his motion."

B. *The misconduct of the State authorities increased petitioner's need for the assistance of counsel.*

The Pennsylvania statutes explicitly provide that "In all case of arrest made by any police officer or constable of the city of Philadelphia * * *, it shall be the duty of the police officer or constable making such arrest to take the person arrested for a hearing to the office of the alderman or magistrate nearest to the place where the arrest was made * * *." Purdon's Penna. Stat., Tit. 53, §6558; cf. *id.*, Tit. 19, § 3. In order to facilitate the administration of this requirement of criminal justice the Magistrates' Court Act of 1937 establishes divisional police courts at ten or more police stations and a central police court in session during the entire twenty-four hours of each day. *Id.*, Tit. 42, §§ 1110-1111. Nevertheless the Philadelphia police disregarded this statutory duty. For thirty hours after petitioner's arrest on June 3, the Philadelphia police not only detained him unlawfully, without bringing him before a magistrate but they shunted him from police station to police station for questioning and denied him the opportunity to communicate with his family or friends. Only at two o'clock in the morning was he allowed to speak to his wife "for a period not exceeding ten (10) minutes." The next morning he was called upon to enter his plea. (R. 3)

Such conduct on the part of police officials is not merely a departure from formal routine. Some years ago the Law Association of Philadelphia reported, after a survey of the administration of criminal law in that city, that "the private or secret interrogation of arrested persons prior to indictment, or after indictment and prior to trial, has become common practice and in many cases the foundation of scandal, harsh criticism and judicial condemnation. * * * The secrecy with which such inquires are conducted,

the ignorance of the prisoner of his rights, the harsh and frequently cruel methods applied, and the great burden placed on a defendant in convincing a jury that a confession, admission or statement of alleged information were such as exclude them from consideration, are all grave dangers in the practictal use of the system." See American Law Institute Code of Criminal Procedure (1930), p. 64. The Pennsylvania statutes requiring the police to bring an arrested person promptly before a magistrate are designed to protect men against these dangers. The same procedural requirement, as this Court pointed out in *McNabb* case, pervades the criminal procedure of nearly all the States. *McNabb* v. *United States*, 318 U. S. 332, 342-343. It checks resort "to those reprehensible practices known as the 'third degree' which, although universally rejected as indefensible, still find their way into use. It aims to avoid all the evil implications of secret interrogation of persons accused of crime. * * * The history of liberty has largely been the history of observance of procedural safeguards" (*Ibid*, pp. 344, 347).

Such serious misconduct on the part of the police is surely relevant in determining whether as a result of the court's failure to offer petitioner legal assistance an element of fundamental unfairness operated in the process which resulted in his confinement. When the police respect the basic safeguards of criminal procedure, the defendant is brought before a magistrate promptly upon his arrest, informed of the charges against him, given time to consider his predicament and afforded an opportunity for consultation with his family or friends. Thereafter a careful judge, before accepting a plea, would assure himself that the defendant understood the charges, his right to a trial and the consequences of pleading guilty. Where those safeguards are observed, it is possible that the voluntary entry

of a plea of guilty without a request for the assistance of counsel is to be taken as evidence that the accused felt no unfairness in being called upon to answer the indictment without legal advice. Cf. *Foster* v. *Illinois*, 332 U. S. 134. But compare *Tomkins* v. *Missouri*, 323 U. S. 471; *Johnson* v. *Zerbst*, 304 U. S. 458. That question is not present here, however, for in petitioner's case all those safeguards were omitted. Petitioner was not given a hearing before a magistrate and formally charged with the crimes (R. 3). Except for a brief talk with his wife at two o'clock in the morning, he was "deprived of his right to contact anyone" (R. 3). During much of this period he was subjected to questioning. Thus, he had no opportunity to study the charges, to obtain comfort and guidance, and to form a judgment after mature consideration as to the course he should follow. Nor did the trial court instruct him concerning the offenses and inform him of his rights. Without guidance of any kind he was "arrested, placed on trial, sentenced and delivered to the Eastern State Penitentiary all within a period of *less than* forty-eight (48) hours" (R. 3).

It needs no argument to demonstrate that this conduct of the part of the State officials was calculated to rush petitioner in a state of helplessness, confusion and despondency into acquiescence with the prosecution's will. In *Haley* v. *Ohio*, 332 U. S. 596 a majority of the Court set aside for denial of due process of law a conviction based upon a confession obtained by secret questioning while the defendant was held incommunicado. Four justices declared, "The Fourteenth Amendment prohibits the police from using the private secret custody of either man or child as a device for wringing confessions from them" (p. 601). The concurring opinion called attention to "the inevitable disquietude and fears police interrogations na-

turally engender in individuals questioned while held incommunicado, without the aid of counsel and unprotected by the safeguards of a judicial inquiry" (p. 605). The Wickersham Commission also found that when prisoners were held incommunicado with no word from their families and no opportunity for legal advice, the "long periods of lonely suspense may well lead an innocent man to admit guilt, even if no third-degree practices in the strict sense are employed." National Commission on Law Observance and Enforcement, Report on Lawlessness in Law Enforcement, 167-168. And it is to prevent such unfairness that a Royal Commission on Police Powers and Procedure recommended in 1929, that—

> A rigid instruction should be issued to the Police that no questioning of a prisoner, or a "person in custody," about crime or offense with which he is, or may be, charged, should be permitted.[4]
>
> • • • • • • •
>
> All persons in custody, on arrival at the Police Station, should be allowed facilities to consult with their legal advisors, and also their friends except when the interests of justice forbid.[5]

On the present record it cannot be assumed that the harassment and psychological pressures to which petitioner was subjected were inoperative when petitioner answered the indictment. He was rushed from arrest to confinement without interruption. The bewilderment and despair thus engendered would destroy whatever opportunity petitioner might otherwise have had to prepare an understanding answer to the accusations against him. As a layman he was not equipped, even under the most favorable circumstances,

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[4] Report of the Royal Commission on Police Powers and Procedure (London, 1929), p. 118.

[5] *Id.*, p. 119.

to comprehend the different charges in the indictments or to appreciate the available lines of defense. It would be remarkable if, after being held incommunicado by the police for forty hours much of which were given over to questioning, he was able to penetrate the legal verbiage to the substance of the charge.

For the same reason petitioner's failure to request counsel does not imply that he was satisfied to plead guilty without legal advice. He did not know of his right to counsel (R. 6). Excepting a ten minute period, he had unlawfully been held incommunicado ever since his arrest (R. 3). The judge showed no concern for his protection (R. 3, 52-53). On these uncontradicted allegations, petitioner's failure to protest the unfairness of the proceedings must be attributed to the despair resulting from helplessness rather than to the absence of a "felt need of counsel" (*Foster* v. *Illinois*, 332 U. S. 134, 138). *Tomkins* v. *Missouri*, 323 U. S. 485.

C. *The trial court omitted any measures which might have protected petitioner against unfairness.*

The unfairness which operated against petitioner from his arrest until his sentence and commitment was multiplied by the character of the only hearing which he received. His petition for *habeas corpus* sets forth without contradiction that he "was never given a hearing before a City Magistrate" and when he was arraigned in Court of Quarter Sessions "he was not advised of his right to engage counsel, nor was he instructed of the particular offenses covering Bills # 696, 698, 699 and 701" (R. 3). The transcript certified by the official stenographer and approved by the presiding judge as a full and accurate statement of the proceedings (R. 54) shows no solicitude for fairness to the

accused. In substance the court's remarks to petitioner were confined to this comment (R. 51-52)—

> Q. 1937, receiving stolen goods, a saxophone. What did you want with a saxophone? Didn't hope to play in the prison band then, did you?
>
> The Court: Ten to twenty in the Penitentiary.

The course of decision here has established the rule that the Fourteenth Amendment leaves the States the freest possible scope in the choice of criminal procedures so long as the procedure adopted is not in conflict with deep-rooted traditions of justice. *Snyder* v. *Massachusetts*, 291 U. S. 97; *Palko* v. *Connecticut*, 302 U. S. 319; *Malinski* v. *New York*, 324 U. S. 401, 412; *Adamson* v. *California*, 332 U. S. 46, 59. Accordingly, there may be some latitude, even where legal advice is necessary to the substance of a hearing, for the State to choose between alternative methods of giving this indispensable assistance. In many cases the judge's watchful guidance may be sufficient. Under the English practice which lies beneath the colonial laws relied upon in *Betts* v. *Brady*, 316 U. S. 455, it was the judge's duty to secure the interests of the accused. Thus Blackstone noted, while discussing arraignment and pleas, that "the judges of the court * * * are to be of counsel for the prisoner, and to see that he hath law and justice." 4 Bl. Comm. *324; see also 1 Cooley's Const. Lin. (8th ed.), 698 *et seq.* *Betts* v. *Brady*, *supra*, permitted Maryland to follow this procedure in a case which raised a simple question of fact, but the Court was careful to point out that the Maryland judges were always solicitors for the interests of defendants who lacked counsel and would make an appointment if serious disadvantage appeared (pp. 472-473).[6] In *Foster* v.

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[6] Judge Bond's description of the Maryland practice was as follows (Record, p. 29):

"That every presiding judge will care for the interests of a defendant in every case if he is without counsel is, as argued, doubtless illusory. The

Illinois, 332 U. S. 134, the Court reaffirmed the earlier decision, holding that the failure of the common law record to disclose an offer of counsel did not establish that the trial was fundamentally unfair. Foster, like Betts, based his case upon the bald assertion that only by the appointment of counsel could a fair hearing be secured; and the Court's decision denying the claim rests, as we read the opinions, upon the care which the trial court appeared to have exercised to safeguard the interests of the accused. In the Brief for the Petitioner in *Gregger* v. *Burke, Warden*, we have considered some of the limitations on this procedure, but no such question is raised in the instant case because the judge made no effort "to be of counsel for the prisoner and to see that he hath law and justice" (4 Bl. Comm. *324).

Conclusion

Unlike the arguments presented in *Betts* v. *Brady* and *Foster* v. *Illinois*, petitioner's case does not depend upon the claim that counsel must be appointed in all serious criminal cases, nor does it attack the validity of all sentences passed upon pleas of guilty without counsel being offered or requested. We contend only that when a defendant has been accused of crimes which he cannot comprehend sufficiently to make an intelligent response alone and unaided—when he has been subjected to all the confusion and despair engendered by unlawful confinement, shut off from friends and counsel—due process of law requires the State to adopt some measure sufficient to give him a real understanding of

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argument that he can never do so is perhaps logical, but not always true, I think. I have been struck by the care exercised even by prosecuting [fol. 39] attorneys for the interests of prisoners who have had no counsel, at least so far as eliciting the truth in their favor has been concerned. Trials without counsel are less contentious, and especially when trial without jury is elected, as is usual in Maryland, are more informal. Certainly my own experience in criminal trials over which I have presided has demonstrated to me that there are fair trials without counsel employed for the prisoners."

the charges and the potential defenses, and of the courses of conduct which he may follow. The procedure to be selected is for the State to determine; the measures adopted may include an offer of counsel or, in appropriate cases, an impartial inquiry by a fair-minded judge. The fundamental unfairness that vitiates petitioner's conviction is the failure of the commonwealth to adopt any measure suited to assuring petitioner an opportunity to comprehend and answer the accusations. The whole course of the proceedings was calculated to rush petitioner to the penitentiary without a real opportunity to make his defense. The indictments charged offenses involving nice legal distinctions to which important defenses may well have been available but at the existence of which petitioner, as a layman, could scarcely guess. The prosecuting officials, through indifference or overzealousness, detained him unlawfully isolated from family and friends. The court neither explained the offenses nor advised him of his constitutional rights, although he was ignorant thereof, nor took other steps to give him a fair opportunity to understand and answer the accusations. Under all the circumstances it is plain that petitioner did not have the substance of a hearing, and was sentenced to the penitentiary without "due process of law."

Therefore the judgment of the Supreme Court of Pennsylvania should be reversed and the case remanded.

Respectfully submitted.

ARCHIBALD COX.

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